Ariffin bin A Ghani v Malayan Banking Bhd

HIGH COURT (MELAKA) — ORIGINATING SUMMON NO MA-24NCvC-500–12 OF 2023
MOHD RADZI ABDUL HAMID J
7 JANUARY 2025

Bank and banking business — Bank and customer — Customer co-borrower of loan granted by bank — Interest on debt after bankruptcy order — Whether the charging of interest after date of bankruptcy was illegal — Whether the money paid for the interest from the date of bankruptcy should be refunded — Insolvency Act 1967 s 8(2A)

This was an application plaintiff for orders pursuant to s 8(2A) of the Insolvency Act 1967 ('the Act'). The plaintiff was the owner of a piece of land together with his wife were co-borrowers of a loan granted by the defendant. The property was collateralized in favour of the defendant as security for the loan and then adjudged a bankrupt on 8 October 2012. Since the act of bankruptcy various payments were made into the loan account. There was no segregation of the loan account between the plaintiffs as a bankrupt and the co-borrower and the defendant had continued to charge interest on the loan account despite the prohibition under s 8(2A) of the Act as far as it concerns the bankrupted plaintiff. The plaintiff contended that following his act of bankruptcy, the defendant, as a secured creditor was legally prohibited from charging interest in respect of his debt if the defendant did not realise the security it holds within twelve months from the date of the bankruptcy order. Therefore, any monies paid based on the continued charging of interest amounts to an overpayment and should be refunded to the plaintiff.

Held:

(1) The effect of s 8(2) of the Act on the prohibition of charging interest was settled law. It was clear by the provision of s 8(2A) of the Act and those judicial authorities, a secured creditor was not permitted by law to charge interest since the date of bankruptcy if within twelve months since that date the secured creditor had not realise the security. It was not a disputed fact in this application that the defendant have not realised the security within twelve months since the date of bankruptcy. Defendant was therefore barred as a secured creditor from charging interest on the plaintiff's debt for the period of bankruptcy (see para 9).

(2) There could be no argument favouring the defendant that the plaintiff had agreed to the redemption amount where interest was included and

was therefore estopped from challenging its legality later. The argument of approbation and reprobation and whatever may have been negotiated and agreed between parties could not surmount the express prohibition of s 8(2A) of the Act. It was clear that the defendant's continued charging of interest against the plaintiff post-date of bankruptcy was unlawful notwithstanding that he was a co-borrower. Interest from that date could only continue to be charged against the co-borrower. Therefore, it was incumbent upon the defendant to segregate the plaintiff's indebtedness from the co-borrower to reflect the application of s 8(2) of the Act. Notwithstanding that, where a redemption statement was issued, the defendant was entitled to provide a statement for the full amount as it included the co-borrower's indebtedness under the loan account. In the event the redemption is paid, that amount would be applied equally to extinguish all the plaintiff's indebtedness as at the bankruptcy date less interest during the period of bankruptcy (see paras 10–12).

(3) All payments into the account should be applied not only towards the general indebtedness under the loan account but also towards ensuring compliance with s 8(2A) of the Act as far as it concerns the plaintiff. The plaintiff was entitled to a deduction of all interest charged from the date of bankruptcy for the period of his bankruptcy. Thus, the benefit of all payments towards reduction of the loan should be equally applied for the benefit of the plaintiff as much as it applies to the co-borrower (see para 14).

(4) There could be no claim for over-payment since all payments were made to the same loan account as the co-borrower towards reduction of the over-all indebtedness. The plaintiff was only entitled to a deduction of all interest charges against him. For that reason, there could not be any refund of ail monies paid post-date of bankruptcy (see para 14).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk perintah menurut s 8(2A) Akta Insolvensi 1967 ('Akta tersebut'). Plaintif adalah pemilik sebidang tanah bersama dengan isterinya yang merupakan peminjam bersama untuk pinjaman yang diberikan oleh defendan. Harta tersebut telah dicagarkan kepada defendan sebagai jaminan untuk pinjaman tersebut dan kemudiannya diisytiharkan bankrap pada 8 Oktober 2012. Sejak tindakan kebankrapan, pelbagai pembayaran dibuat ke dalam akaun pinjaman. Tiada pengasingan akaun pinjaman antara plaintif sebagai bankrap dan peminjam bersama dan defendan terus mengenakan faedah ke atas akaun pinjaman walaupun larangan di bawah s 8(2A) Akta tersebut adalah faedah setakat yang berkenaan dengan plaintif yang bankrap. Plaintif berhujah bahawa berikutan tindakan kebankrapannya, defendan, sebagai pemiutang berkepentingan dilarang daripada mengenakan faedah berkenaan atas hutangnya sekiranya defendan tidak menjual harta tersebut dalam tempoh dua belas bulan dari tarikh

perintah kebankrapan. Oleh itu, sebarang wang yang dibayar berdasarkan kadar faedah yang berterusan merupakan lebihan bayaran dan harus dikembalikan kepada plaintif.

Diputuskan:

(1) Kesan s 8(2) Akta tersebut mengenai larangan mengenakan faedah adalah kukuh di sisi undang-undang. Adalah jelas menurut peruntukan s 8(2A) Akta tersebut dan atas otoriti tersebut, pemiutang berkepentingan tidak dibenarkan oleh undang-undang untuk mengenakan faedah sejak tarikh kebankrapan sekiranya dalam tempoh dua belas bulan dari tarikh itu pemiutang berkepentingan tersebut tidak menjual harta yang dicagarkan tersebut. Fakta yang tidak dipertikaikan dalam permohonan ini adalah bahawa defendan tidak menjual harta tersebut dalam tempoh dua belas bulan sejak tarikh kebankrapan. Oleh itu, defendan dilarang sebagai pemiutang berkepentingan daripada mengenakan faedah ke atas hutang plaintif sepanjang tempoh kebankrapan (lihat perenggan 9).

(2) Tiada hujah yang memihak kepada defendan bahawa plaintif telah bersetuju dengan jumlah penebusan di mana faedah dikenakan. Oleh itu, defendan dihalang daripada mencabar keesahannya. Hujahan bahawa 'mengambil manfaat daripada sesuatu tindakan sambil mencabarnya dalam masa yang sama' atau terdapat sebarang rundingan yang dipersetujui antara pihak-pihak tidak dapat mengatasi larangan nyata s 8(2A) Akta tersebut. Adalah jelas bahawa defendan terus mengenakan faedah terhadap plaintif selepas tarikh kebankrapan yang menyalahi undang-undang walaupun dia adalah peminjam bersama. Faedah dari tarikh itu hanya terus dikenakan terhadap peminjam bersama. Oleh itu, adalah menjadi tanggungjawab defendan untuk mengasingkan hutang plaintif daripada peminjam bersama untuk mencerminkan penggunaan s 8(2) Akta tersebut. Walaupun begitu, di mana penyata penebusan dikeluarkan, defendan berhak memberikan penyata untuk jumlah penuh kerana ianya termasuk hutang peminjam bersama di bawah akaun pinjaman. Sekiranya penebusan dibayar, jumlah itu akan digunakan sama rata untuk menyelesaikan semua hutang plaintif pada tarikh kebankrapan ditolak faedah semasa tempoh kebankrapan (lihat perenggan 10–12).

(3) Semua pembayaran ke dalam akaun hendaklah digunakan bukan sahaja untuk jumlah hutang utama di bawah akaun pinjaman tetapi juga ke arah memastikan pematuhan dengan s 8(2A) Akta tersebut setakat yang berkenaan dengan plaintif. Plaintif berhak mendapat potongan semua faedah yang dikenakan dari tarikh kebankrapan untuk tempoh kebankrapannya. Oleh itu, faedah semua pembayaran ke arah pengurangan pinjaman harus digunakan sama rata dengan faedah

plaintif sama seperti yang terpakai kepada peminjam bersama (lihat perenggan 14).

(4) Tiada tuntutan untuk lebihan bayaran kerana semua pembayaran dibuat ke akaun pinjaman yang sama dengan peminjam bersama untuk pengurangan keseluruhan hutang. Plaintif hanya berhak mendapat potongan semua bayaran faedah terhadapnya. Atas sebab itu, tiada sebarang bayaran balik untuk semua wang yang dibayar selepas tarikh kebankrapan (lihat perenggan 14).]

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449; [2013] 1 CLJ 24, FC (refd)
Chin Nyuk Min v Mystique Bay Sdn Bhd [2012] 10 MLJ 872; [2013] 3 CLJ 843, HC (refd)
CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1; [2019] 2 CLJ 1, FC (distd)
Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors [2020] 6 MLJ 703; [2020] 4 CLJ 449, CA (distd)
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404; [1991] CLJ Rep 174, SC (refd)
Mohd Sofi bin Abdul Ghafar v Ketua Pengarah Insolvensi & Anor [2021] 11 MLJ 813; [2021] 7 CLJ 621, HC (refd)
OCBC Bank (M) Bhd v Tan Eng Kwee and another application [2003] 6 MLJ 470; [2003] 3 CLJ 161, HC (refd)
Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal [2013] 3 MLJ 1; [2013] 2 CLJ 893, FC (refd)
Tong Soon Tiong & Ors v FA Securities Sdn Bhd [2013] MLJU 1585; [2013] 3 MLRA 94; [2013] 2 CLJ 448, FC (refd)
Valiant Development Sdn Bhd v Malayan Banking Bhd [2020] MLJU 2230; [2020] 1 LNS 2091; [2020] CLJU 2091, HC (refd)

Legislation referred to

Contracts Act 1950 s 29
Insolvency Act 1967 s 8(2), (2A)

Ahmad Musthafi bin Mohamad (Hashim Amran Tabian Ahmad) for the plaintiff.
Mohd Faizal bin Rosli (Jal & Lim) for the defendant.

Mohd Radzi Abdul Hamid J:

MATTER BEFORE THIS COURT

[1] This is a decision of this court on an application by way of originating summon filed by the plaintiff for certain orders pursuant to s 8(2A) of the

Insolvency Act 1967 ('the Act'). Essentially the plaintiff claims that following his act of bankruptcy, the defendant, as a secured creditor is legally prohibited from charging interest in respect of his debt if the defendant does not realise the security it holds within twelve months from the date of the bankruptcy order and therefore any monies paid based on the continued charging of interest amounts to an overpayment and should be refunded to the plaintiff.

BACKGROUND FACTS

[2] The background facts are that:

(a) the plaintiff is the owner of a piece of land held under GMM 289, Lot 3094 (previously HMM 63 PT1196), Mukim Peringgit, Daerah Melaka Tengah ('property');

(b) the plaintiff and his wife are co-borrowers of a loan granted by the defendant;

(c) that property was collateralised in favour of the defendant as security for the loan;

(d) the plaintiff was adjudged a bankrupt on 8 October 2012;

(e) since the act of bankruptcy various payments were made into the loan account;

(f) there was no segregation of the loan account between the plaintiffs as a bankrupt and the co-borrower; and

(g) the defendant has continued to charge interest on the loan account despite the prohibition under s 8(2A) of the Act as far as it concerns the bankrupted plaintiff.

ARGUMENTS OF PARTIES

[3] The plaintiff contends that s 8(2) of the Act prohibits the defendant from charging interest since the defendant have not realised the security within a period of 12 months from the date of the bankruptcy. The fact that the defendant has not realised the security is not disputed. Since the defendant is not entitled to charge interest the defendant should have segregated his account as a bankrupt and not continued to be placed in the same account with the co-borrower where interest continues to be charged. Since there has been continuous charging of interest against him from the date of bankruptcy, the plaintiff claims there has been over payment in the reduction of his indebtedness and he is entitled to a refund of all monies that have been applied towards payment of interest.

[4] To support his case the plaintiff referred to the decisions in *Andrew Lee*

Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449; [2013] 1 CLJ 24, *OCBC Bank (M) Bhd v Tan Eng Kwee and another application* [2003] 6 MLJ 470; [2003] 3 CLJ 161 and *Chin Nyuk Min v Mystique Bay Sdn Bhd* [2012] 10 MLJ 872; [2013] 3 CLJ 843.

[5] The defendant argues that the plaintiff is bound by the terms of the loan and charge documents and therefore the defendant is entitled to claim full interest in accordance with what has been contractually agreed. In addition, it was argued that there was an attempt by the plaintiff to sell the land by way of private treaty and since the plaintiff had agreed to the redemption sum stated by the defendant the plaintiff is therefore estopped from later questioning the legality of the amount. It was further argued it would be against the law to order any overpayment to be returned to the plaintiff since his affairs and assets have since the date of bankruptcy, vested in the Director General of Insolvency.

[6] In support of its case the defendant referred to the decisions in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1; *Genneva Malaysia Sdn Bhd vTio Jit Hong & Ors* [2020] 6 MLJ 703; [2020] 4 CLJ 449; *Tong Soon Tiong & Ors v FA Securities Sdn Bhd* [2013] MLJU 1585; [2013] 3 MLRA 94; [2013] 2 CLJ 448 and *Mohd Sofi bin Abdul Ghafar v Ketua Pengarah Insolvensi & Anor* [2021] 11 MLJ 813; [2021] 7 CLJ 621.

DELIBERATIONS

[7] Section 8(2A) of the Act provides:

> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a bankruptcy order if he does not realise his security within twelve months from the date of the bankruptcy order.

[8] It must be stated that decisions that dealt specifically with s 8(2A) of the Act must be distinguished from cases that do not. The decisions in *CIMB Bank Bhd v Anthony Bourke* and *Genneva Malaysia* referred to by the plaintiff did not deal with s 8(2A) of the Act. In the case of *CIMB Bank* the dispute was on the issue of construction of the loan documents and the applicability of s 29 of the Contracts Act 1950 and in *Genneva Malaysia*, it was an appeal against an order for summary judgment on the transaction of purchase and sale of gold.

[9] Therefore, this court must primarily be guided by the decisions in cases that have addressed the effect of s 8(2A) of the Act. The effect of s 8(2) of the Act on the prohibition of charging interest is settled law. In addition to the cases referred to by the plaintiff, this court refers also to the decisions in *Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal* [2013] 3 MLJ 1; [2013] 2 CLJ 893 and *Valiant Development Sdn Bhd v Malayan Banking Bhd* [2020] MLJU 2230; [2020] 1 LNS 2091; [2020] CLJU 2091. It is clear

by the provision of s 8(2A) and those judicial authorities, a secured creditor is not permitted by law to charge interest since the date of bankruptcy if within 12 months since that date the secured creditor have not realise the security. It is not a disputed fact in this application that the defendant have not realised the security within 12 months since the date of bankruptcy. Referring to the defendant in this application, it is therefore barred as a secured creditor from charging interest on the plaintiff's debt for the period of bankruptcy. In *Pilecon Realty* the Federal Court held:

> Thus, although a secured creditor under sub-s 8(2) of the BA was free to deal with his security, with the insertion of the sub-s (2A) into s 8, the chargee must realise their security promptly within six months of the receiving order failing which the chargee cannot claim any interest.
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> Decisions of the courts prior to sub-s (2A) being introduced into s 8 of the BA, or does not involve any issue arising from s 8(2A), would accordingly be of little, if any, assistance to us, in making a considered decision in this case. The duty of the courts is to make a construction to cure the mischief and advance the remedy It is not our duty either to add or to take away the meaning of the words of a statute unless there are good reasons for thinking that the Legislature had intended to limit its operation.
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> For the courts to limit the application of a certain provision when the Legislature had failed to express such an intention would be to usurp the functions of the Legislature which is not within the competence of the courts to do. The duty of the courts is to give full effect to the language of the law. The function of the courts is to construe the language of the referral and related provisions as they stand, to give effect to the purpose of enacting the provision, and the mischief which existed which the Legislature sought to eliminate.

[10] That being the case, there can be no argument favouring the defendant that the plaintiff had agreed to the redemption amount wherein interest was included and is therefore estopped from then challenging its legality later. As held in *Valiant Development*, the argument of approbation and reprobation and whatever may have been negotiated and agreed between parties cannot surmount the express prohibition of s 8(2A) of the Act. Reference is also made to the decision of the Supreme Court in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404; [1991] CLJ Rep 174 where it was held that there can be no estoppel as against statutory provisions. The court in *Valiant Development* stated:

> [18] Tied up to the issue of approbation and reprobation was the series of meetings held between MBB, the official receiver and the contributories and/or directors where it was said the termination of the winding up and discharge of bankruptcy was agreed upon as long as MBB was allowed the auction proceeds in full.
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> [19] In this regard, the court was of the considered opinion that whatever was purported to have been agreed upon cannot negate the statutory provision of s 8(2A) of the BA. This was so held in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap*

Pak Leong [1998] 3 MLJ 151; [1998] 3 CLJ 503 where an agreement violated a condition of the licence where such breach was an offence under s 21 of the Pool Betting Act 1967. This was held to be contrary to s 24(a) of the Contract Act 1950 and the agreement was illegal and void.

[20] The same here where such an agreement, if any, is contrary to s 8(2A) and is illegal and void. Such an agreement cannot override the clear provisions of statute. If MBB is not entitled to the interest after the applicant has been wound up, then it cannot be said that now MBB is entitled because parties had come to a resolution or agreement.

[11] That being the position, it is clear that the defendant's continued charging of interest against the plaintiff post-date of bankruptcy is unlawful notwithstanding that he is a co-borrower. Interest from that date can only continue to be charged against the co-borrower. Therefore it is incumbent upon the defendant to segregate the plaintiff's indebtedness from the co-borrower to reflect the application of s 8(2) of the Act.

[12] Notwithstanding that, it is the court's view where a redemption statement is issued the defendant is entitled to provide a statement for the full amount as it includes the co-borrower's indebtedness under the loan account. In the event the redemption is paid, that amount will be applied equally to extinguish all the plaintiff's indebtedness as at the bankruptcy date less interest during the period of bankruptcy.

[13] As stated above, all payments into the account should be applied not only towards the general indebtedness under the loan account but also towards ensuring compliance with s 8(2A) of the Act as far as it concerns the plaintiff. The plaintiff is entitled to a deduction of all interest charged from the date of bankruptcy for the period of his bankruptcy. Thus, the benefit of all payments towards reduction of the loan should be equally applied for the benefit of the plaintiff as much as it applies to the co-borrower.

[14] Can the plaintiff now argue that there has been over-payment as far as his account is concerned and claim a refund? In this court's view there can be no claim for over-payment since all payments are made to the same loan account as the co-borrower towards reduction of the over-all indebtedness. The plaintiff is only entitled to a deduction of all interest charges against him. For that reason, there cannot be any refund of all monies paid post-date of bankruptcy.

DECISION

[15] Therefore, having considered all arguments and based on the above deliberations this court finds and holds that:

(a) the charging of interest as against the plaintiff from the date of his

bankruptcy on 8 October 2012 is in contravention of the express provision of s 8(2A) of the Act; and

(b) the amount of interest charged from the date of bankruptcy and continuing for the period of bankruptcy is ordered to be deducted from the plaintiff's indebtedness. The plaintiff's application for the refund of monies paid is dismissed. No order as to costs.

Order accordingly.

Reported by Muhammad Azham Marwan